United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7425

United States Court of Appeals

FOR THE SECOND CIRCUIT

AEROTRADE, INC. and AEROTRADE INTERNATIONAL, INC.,

Plaintiffs,

—against—

REPUBLIC OF HAITI,

Defendant-Appellee,

—against—

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant.

APPELLANT'S BRIEF

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Preliminary Statement

Judge Edward Weinfeld of the United States District Court for the Southern District of New York rendered the decision, order and judgment from which this appeal is taken. The decision was not reported.

Statement of Issues

I. Whether Republic of Haiti may recover, from Hartford Accident & Indemnity Company, overdraft charges sustained by a third person as a result of the attachment?

II. Whether the damages recoverable by Republic of Haiti are limited by its duty to minimize the damages?

Statement of the Case

On December 13, 1974, Republic of Haiti, (hereinafter referred to as "Haiti"), moved pursuant to Fed. R. Civ. P. 65.1 to enforce an attachment bond executed by the Hartford Accident & Indemnity Company (hereinafter referred to as "Hartford") shortly after the commencement of this action. Judge Weinfeld referred the case to Magistrate Schreiber to hear and determine damages by order dated February 4, 1975.

Magistrate Schreiber, after several conferences, and the submission of various papers, held hearings on January 20 and January 29, 1976. Based on these hearings he determined that Haiti was entitled to recover only the sum of $13,553, and not the full amount of the bond ($35,000). By opinion dated July 16, 1976, Judge Weinfeld rejected Magistrate Schreiber's determination in part and held that Haiti was entitled to recover the full amount of the bond. Judgment was entered on August 27, 1976 in favor of Haiti and against Hartford for the sum of $39,625.75, the full amount of the bond plus interest from June 11, 1974. Hartford appeals herein from that judgment.

Statement of Facts

A. The Underlying Case

On August 17, 1973, Aerotrade, Inc. and Aerotrade International, Inc. (hereinafter collectively referred to as "Aerotrade") commenced this action against Republic of Haiti to recover damages for breach of a military pro-

curement contract in excess of $2,000,000. Aerotrade first obtained an order of attachment against the funds of Haiti on deposit at First National City Bank (hereinafter referred to as "Citibank"). This attachment was unsuccessful as there was no account in the name of Haiti at that Bank. Thereafter Aerotrade obtained an order of attachment against the funds of Banque Nationale de la Republique d'Haiti (hereinafter referred to as "Banque") at Citibank. The United States Marshal levied upon $867,000 in that account on October 5, 1973. (app. 20).

In connection with the first order of attachment, Hartford executed an undertaking in the sum of $40,000.00 (app. 15-19). By this undertaking Hartford bound itself to pay

> "all legal costs and damages which may be sustained by reason of the attachment if the Defendant, Republic of Haiti, recovers judgment or it is finally decided that (Aerotrade was) not entitled to an attachment of the Defendant's Republic of Haiti, property,"

up to the sum of $35,000. The balance of the undertaking, $5,000, guaranteed payment of the Marshal's fees and expenses.

Judge Weinfeld subsequently determined in a written opinion dated May 24, 1974, reported at 376 F. Supp. 1281 (SDNY, 1974) that Haiti was not amenable to suit on this claim, in the United States, because of the doctrine of sovereign immunity. Accordingly, the complaint was dismissed and the attachment was vacated. The Marshal returned the funds to Citibank on June 10, 1974.

B. Haiti's Damage Claims

It is conceded herein by Hartford that the event triggering Hartford's obligation has occurred; it was decided that Aerotrade was not entitled to the attachment. The issues on this appeal, and in this case, solely relate to the amount of "legal costs and damages sustained" by Haiti.

Haiti claims two types of damages: legal fees incurred in vacating the attachment, and overdraft interest charges on the attached account of Banque at Citibank. Haiti paid Andreas F. Lowenfeld, its attorney, the sum of $16,219.80 representing 260 hours (app. 113-115) at an hourly rate of $60 and $619.80 in disbursements (app. 208). It was not contested that the hourly rate was reasonable. Of these 260 hours, eight hours were spent making claim on the bond herein, and it was conceded by Haiti that these hours are not recoverable (app. 189). Mr. Lowenfeld also spent 32 hours (of the 260) on a related action, entitled "Aerotrade Inc. v. Banque Nationale de la Republique d'Haiti" in which no order of attachment was made (app. 197). Three other hours were billed to Haiti concerning the suspension of United States foreign aid to Haiti (app. 206-207). Magistrate Schreiber found (app. 264-265) that none of the fee for the above mentioned 43 hours was the proximate result of the attachment, and reduced the disbursements proportionately. Magistrate Schreiber concluded that attorneys' fees and disbursements of $13,553.02 were recoverable. Judge Weinfeld mentioned (app. 268) and did not reject this conclusion, (although it may be said that he did not reach it because of his position on interest), and no appeal, by either party was taken from this finding. The amount of recoverable legal fees, therefore is not before this Court.

The only issues on this appeal relate to the overdraft charges, which were charged by Citibank against Banque,

not against Haiti. Hartford contends that Haiti did not suffer any loss proximately caused by the attachment, in connection with these charges. Even if there was a loss proximately caused by the attachment, it could have been mitigated, and the whole amount is not recoverable.

Banque is a commercial bank, chartered under the laws of Haiti (app. 178-179). Banque is not part of the government of Haiti (app. 177-178). The funds attached at Citibank were not the property of Haiti, but belonged to Banque (app. 177).

Between October 5, 1973 and June 10, 1974, Citibank made various charges against the account of Banque. Aracy Troxell Dean, assistant vice president of Citibank, computed that of these charges, $46,810.38 was attributable to overdraft interest charges due to the absence of $1,083,750 from September 24, 1973 (app. 146-147) through June 10, 1974 (app. 148). The sum of $1,083,750 consists of $867,000 attached by the Marshal, and an additional amount equal to 25% ($216,750) segregated by Citibank (app. 136-137). Magistrate Schreiber held that these overdraft charges were not recoverable at all. Judge Weinfeld held that the charges were recoverable by Haiti, but limitted to the overdraft interest charges due to the absence of $867,000 from October 5, 1973 to June 10, 1974 (app. 270). Haiti took no appeal from this finding. Hartford concedes that the amount of these charges, *if wholly recoverable,* together with the attorney's fees found by Magistrate Schreiber and Judge Weinfeld, exceeds the amount of the bond, $35,000.

The overdraft charges therefore did not cause any loss or damage to Haiti at the time the charges were made to the account of Banque at Citibank (October 1973 through June 1974).

Fourteen months after the attachment was vacated, in late July, 1975, the Minister of Finance of Haiti and the

President of Banque exchanged letters (app. 99-104), and the account of Haiti at Banque (in Haiti) was debited for $46,810.32 (app. 164).

There was no written agreement to make this payment prior to this time (app. 165), nor any written agreement or other document (app. 174). There was no legal consideration for this debit, nor was there any legal necessity to pay this amount to Banque (app. 165). The payment was made on a purely "equitable" or "moral" basis (app. 165). Banque "could have gone to Court" in Haiti to enforce payment by Haiti, but there was no evidence offered to show that Banque would have been succesfful (app. 173) under the laws of Haiti. Therefore, this payment by Haiti was voluntary, and was not damage proximately caused to Haiti by the attachment.

C. Mitigation of Damages

Haiti's attorney did not recommend (app. 199) and neither Haiti nor Banque procured an undertaking or bond to discharge the attachment (app. 184). Such a bond is used to release property subject to an attachment (app. 233). Bonds of this nature are written by authorized insurance companies (app. 234), with collateral. Such a bond could have been procured in 1973 and 1974, to release $867,000, for a premium of $4,637.50, pursuant to rates filed with the Department of Insurance of the State of New York (app. 236-239). Such bonds were written in 1973 and 1974, resulting in premiums of $43,241 in 1973 and $65,973 in 1974 in New York State alone (app. 240). No evidence was adduced that Haiti could not have obtained such a bond.

ARGUMENT

POINT I

Haiti may not recover the overdraft charges.

Certain overdraft interest charges were made by Citibank for the period October 5, 1973 through June 10, 1974 upon the account of its depositor, Banque, some of which charges were the result of the attachment in this action. In July, 1975, Haiti voluntarily, and without legal obligation paid Banque the sum of $46,810.32, as reimbursement of these interest charges. The voluntary nature of this payment precludes any finding that damage to Haiti was proximately caused by the attachment. Because the payment was not a proximate result of the attachment, Haiti may not recover the payment under Hartford's bond. This was the finding of Magistrate Schreiber and Judge Weinfeld, insofar as he rejected this finding, was in error.

The Requirement of Proximate Cause

The attachment bond which is the subject of this proceeding allows recovery to "Defendant, Republic of Haiti [of] legal costs and damages which may be sustained by reason of the attachment." There are two concepts inherent in this provision: that the damages must be sustained by the defendant; and that the damages must be the proximate result of the attachment. In connection with the interest charges, Haiti suffered no loss which was proximately caused by the attachment, and may not recover the interest charges from Hartford.

When Haiti originally made this motion pursuant to Rule 65.1, it claimed that the overdraft interest charged against Banque, as the loss and damage of Banque, were

recoverable by Haiti from Hartford (app. 46). (No mention was made at that time of any plan or agreement or obligation of Haiti to reimburse the interest charges to Banque).

It is clear that Haiti may only recover under the bond for damages *Haiti* sustained, not for damages sustained by a third person. Haiti cited no cases to support its proposition, it was entirely rejected by Magistrate Schreiber (app. 261-262), and this theory was (properly) not urged by Haiti before Judge Weinfeld.

It is also clear that, although Banque may have suffered damages as a result of the attachment, it was not the obligee of Hartford's undertaking. Therefore, Banque's remedy is in tort against the person responsible for the wrongful attachment (i.e., Aerotrade) and not against Hartford on the bond. It is respectfully submitted that Haiti cannot recover on these bases, on this appeal and that the only basis for allowing recovery to Haiti, if at all, is if *Haiti* itself suffered damage as a result of the attachment.

In order to recover damages under the attachment bond, Haiti must show that the damages sought were naturally and proximately caused by the attachment. In *Israel Commodity Co.* v. *Banco do Brasil,* 50 Misc 2d 362, 270 N.Y.S. 2d 283 (Sup. Ct., N.Y. Cty. 1966), the former attachment defendant sued the former unsuccessful attachment plaintiff, and the attachment bond surety, and sought to recover attorney's fees including fees for defending various appeals from the order vacating the attachment, and for defending the action on the merits. Justice Matthew M. Levy observed "Such fees to be recoverable, must of course be the natural and proximate consequence of the wrongful attachment." 50 Misc. 2d at 365, 270 N.Y.S. 2d at 286. The legal fees sought therein were found to be the necessary result of the continued threat of reinstate-

ment of the attachment, and were held to be recoverable. In the case at bar, Haiti proved no compulsion, threat or even legal obligation which forced it to pay Banque the interest charged.

In *Dinnerstein* v. *Max's Gas Station, Inc.* 172 Misc. 27, 13 N.Y.S. 2d 1014 (App. Term, Second Dept. 1939) plaintiff was denied recovery of certain attorney's fees incurred in the defense of the prior attachment action, because "the defendant's legal expenses were not increased or affected by the levy of attachment," which was obtained after the appearance of the defendant. 172 Misc. at 27. Except for the fees on the motion to vacate the attachment, the legal fees "were not the natural and proximate consequence of the levy of attachment. (Thropp v. Erb, 255 N.Y. 75)" 172 Misc. at 28, 13 N.Y.S. 2d at 1014-1015.

Thropp v. *Erb*, 255 N.Y. 75, 174 NE 67 (1930) was another action upon an attachment bond. Plaintiff claimed as damages, attorney's fees incurred in defending the action through and including a trial on the merits. Defendant urged that such damages were not the necessary result of the attachment. The Court noted

> "Without proof that a defendant has used every remedy open to him to dispose of an attachment without a trial on the merits, *the chain of causation from the warrant of attachment to the expenses incurred* in a trial on the merits *may at times be incomplete.*" (emphasis added, 255 N.Y. at 79, 174 N.E. at 68)

Although the Court in *Thropp, supra,* examined the circumstances of that case (255 N.Y. at 80, 174 N.E. at 69) and found that any defense of the action other than by trial on the merits would have been futile, and allowed recovery, the analogy to the case at bar is clear: Haiti

did not prove that the expense it seeks to recover was necessary, and under the circumstances of this case, the chain of causation is incomplete. Indeed Haiti proved that there was no obligation to make payment to Banque, and that the payment was made voluntarily. The reasoning of *Thropp* v. *Erb* has been approved by the Second Circuit. See *T.W. Warner Co.* v. *Andrews*, 73 F. 2d 287, at 291 (1934).

In *Elsman* v. *Glens Falls Indemnity Co.*, 146 Misc. 631, 262 N.Y.S. 642 (Sup. Ct. Bx. Cty. 1933) plaintiff sought to recover under an attachment bond counsel fees and the depreciation of certain stock which was the subject of an attachment. In determining the extent of the recoverable attorney's fees, the Court stated "Causality is the test. Did the attachment produce the expense? Was the loss 'consequential' or was it 'an actual and direct injury?'" 146 Misc. at 638, 262 N.Y.S. at 649. The Court in *Elsman, supra,* found that 'he attorney's fees sought were the actual and direct result of the attachment, and allowed recovery, but denied recovery of the stock depreciation: "I am not satisfied that the depreciation in the value of the stock was a 'detriment proximately caused' by the attachment." 146 Misc. at 637, 262 N.Y.S. at 649. Applying this test to the facts in the case at bar, it is clear that the payment by Haiti to Banque was not a detriment proximately caused by the attachment, and recovery of this payment from Hartford should be denied.

The Nature of the Payment

As set forth in the testimony of Haiti's witness, Serge Elie Charles, upon the hearing before Magistrate Schreiber, on January 20, 1976 (app. 160-186) Haiti had no enforceable legal obligation to reimburse Banque for the interest charges sustained from the attachment. This was

Magistrate Schreiber's determination of the facts. Haiti did not attempt to prove the existence of any Haitian law to the contrary. Indeed Mr. Lowenfeld, counsel to Haiti stated, in reference to the payment, "the law neither applied nor prohibited" (app. 171). All that was offered in the way of Haitian law was that Banque "could have gone to court" but Mr. Charles did not even ..ess at the outcome.

There is nothing in the record that establishes prior agreement to reimburse Banque (that is prior to the actual reimbursement). On the contrary, the absence of such an obligation (prior to December 1974 at least) may be inferred from the absence of any mention in the motion papers (app. 44-51). Since no legal obligation, agreement, (written or unwritten) or liability was proven to exist at the time the interest charges were sustained (October 5, 1973 through June 10, 1974) or at the time this motion was made (December, 1974) the later reimbursement, in July 1975, should be disregarded as voluntary. Haiti in effect made a gift to Banque of $46,810.32 and now seeks to charge Hartford for this gift. This voluntary act, not the attachment, was the proximate cause of Haiti's loss. Magistrate Schreiber found that since Haiti had no legal obligation to reimburse Banque it could not recover the amount reimbursed from Hartford. Evidently, the Magistrate found that the lack of proof of obligation broke the chain of causation between the attachment and Haiti's payment. See *Thropp* v. *Erb, supra.*

Since the payment to Banque was not the proximate result of the attachment, Haiti may not recover the payment under the attachment bond.

The Error in the Court Below

The court below rendered a decision allowing recovery of the full amount of the bond, and particularly of the overdraft charges to Banque. The court based its decision on the following statement:

> "The record establishes that not only did Haiti agree to reimburse Banque for the interest charges, but also that under the law of Haiti, Banque could have sued to recover such interest charges . . . The interest charges paid by Haiti to Banque were a direct consequence of the withdrawal from and the depletion of its account by reason of the attachment against Haiti . . ." (app. 269)

It is respectfully submitted that this decision was contrary to the record, and the court below failed to give appropriate weight to the findings of Magistrate Schreiber.

After reviewing the initial papers (app. 42-61), and hearing oral argument, Judge Weinfeld referred the motion to Magistrate Schreiber to "take testimony and determine" the damages.

Magistrate Schreiber took testimony, received evidence, and found that no enforceable legal obligation on the part of Haiti existed to reimburse Banque for the interest charges. It is evident that Judge Weinfeld rejected this finding, and substituted his own finding that an obligation, particularly an agreement, existed.

Magistrate Schreiber was functioning, pursuant to 28 USC § 636 (b)(1) as a special master, for the purposes of this reference. That section provides, in pertinent part, that the duties of a magistrate may include

> "service as a special master in an appropriate Civil action, pursuant to the applicable provisions of this

> title and the Federal Rules of Civil Procedure for the United States district courts."

The applicable provision is Fed. R. Civ. P. 53, entitled "Masters" which provides in pertinent part:

> "(e) *Report* . . . (2) *In Non-Jury Actions.* In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous."

Thus the appropriate standard for Judge Weinfeld's review of Magistrate Schreiber's findings is whether the findings were "clearly erroneous," the same standard applicable to findings of a district court on appeal. See Fed. R. Civ. P. 52 (a). The court below apparently did not apply this standard, and its failure to do so is an error which may be reversed on this appeal. *Morris Plan Industrial Bank* v. *Henderson,* 131 F. 2d 975 (2nd Cir., 1942).

In *Henderson, supra,* Judge Learned Hand discussed the extent of review of an order of the district court, reversing an order of a referee which granted a discharge in bankruptcy. The "clearly erroneous" standard was applicable to the district court's review of this referee's order, as well as to the circuit court's review of the district court order. Judge Hand held that the question before the circuit court was the same as before the district court, i.e., whether the referee's order was clearly erroneous. Upon examination of the evidence supporting the referee's order, the district court was reversed and the referee's order discharging the bankrupt was reinstated. In the case at bar, Magistrate Schreiber's determination that Haiti may not recover the interest payment was based on all the evidence, and is not clearly erroneous. It is respectfully submitted that this Court should examine the record and the Magistrate's findings in view of the stand-

ard stated in *Henderson,* and reinstate the Magistrate's findings and conclusion. The court below, therefore, should be reversed.

Conclusion:

It is respectfully submitted that the overdraft charges claimed by Haiti as damages were not the proximate result of the attachment. Neither are these damages recoverable against Hartford as the damages of Banque. These were the findings of Magistrate Schreiber, which were not clearly erroneous. Therefore, this Court should deny Haiti recovery of the overdraft charges, and reverse the order of the Court below.

POINT II

Haiti's recovery is limited by its duty to mitigate the damages.

Upon the hearing of this action, Hartford proved the availability of a simple and inexpensive method by which Haiti or Banque could have mitigated the overdraft interest charges incurred at Citibank: a discharge of attachment bond. Since Haiti was required to minimize the damages sustained by reason of the attachment, Haiti's recovery for overdraft charges, if any, must be limited to the cost of such bond.

It was proven that a discharge of attachment bond, required by New York CPLR 6222, could have been issued for a premium of $4,637.50, in order to release $867,000 from attachment, in 1973 and 1974, pursuant to rates filed with the New York State Department of Insurance. It is respectfully submitted that this is *prima facie* proof of

Haiti's opportunity to mitigate damages, and that in the absence of proof to the contrary, Haiti may not recover in excess of this premium. Magistrate Schreiber did not reach this question in view of his finding that Haiti was not entitled to recover any overdraft charges (app. 263). Judge Weinfeld rejected this contention (app. 269). This Court will only reach this issue, if it finds the Magistrate's finding was clearly erroneous. (See argument, *supra*).

It is well settled that Haiti was obliged to mitigate the overdraft charges by bonding the attachment. *W.B. Moses & Sons* v. *Lockwood,* 295 Fed 936 (DC Cir., 1924) is instructive in this regard. Like the underlying action herein, the attachment plaintiff caused the Marshal to levy on property claimed to belong to one not the attachment defendant. After having the attachment vacated, the owner of the property, Lockwood, sued to recover damages for the wrongful attachment, and for malicious prosecution, and recovered judgment. The Court of Appeals reversed, and remanded for a new trial, with instructions:

> "Another principle which is applicable to this case: Where a person's right of property is invaded, it is his duty to do all reasonably within his power to reduce the damages . . . When the plaintiff's car was taken from him, he could have procured its return immediately by giving an undertaking under section 455 of the Code, with security approved by the court. It was his duty to do this, and thus to reduce the defendant's liability. If he had done it, the only loss which would have come to him would be that occasioned by the expense of procuring the undertaking and necessarily incurred for a car between the date of the levy and the return of his own car, assuming he used due diligence throughout." 295 Fed. at 941.

The facts in *Lockwood, supra* are quite similar to the facts in the case at bar. As in *Lockwood,* it was established that the property attached was not the property of the attachment defendant but belonged to a third person (Banque). As in *Lockwood,* the availability of a bond to release the attachment was proven. The legal conclusion to be drawn from these facts, as in *Lockwood,* is that the damage recoverable by the claimant upon the attachment undertaking is limited to the premium required for the discharging bond.

The New York cases also show that the claimant under an attachment bond must do all it can to minimize the damage. *Elsman* v. *Glens Falls Indemnity Co.,* 146 Misc. 631, 262 N.Y.S. 642 (Sup. Ct. Bx. Cty., 1933). There the plaintiff sought to recover damages from the attachment surety, for depreciation of stock, subject to an attachment, during the pendency of the attachment. He failed to notify the attachment plaintiff, or the surety that he wished to sell the stock.

> "The obligation of the plaintiff was more than one of passivity. The law fastened upon him an affirmative duty. In Hamilton v. McPherson, 28 N.Y. 72, 76, 84 A.M. Dec. 330, it was succinctly declared: 'The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible.'" 262 N.Y.S. at 648, 146 Misc. 636

See also *Plessner* v. *Continental Casualty Co.* "A defendant in an action in which there is an attachment against his property is under duty to minimize the damage done by the attachment." 25 Misc. 2d 518, 524, 82 N.Y.S. 2d 540, 547 (Sup. Ct. N.Y. Cty., 1948). Thus Banque or Haiti, in order to recover damages, had the active duty

to take the reasonable step of procuring a discharge of attachment bond, and the damages it may recover are limited, as if it had done so.

In conclusion, Haiti, the party seeking to recover damages herein, was obliged to make reasonable efforts to mitigate the damages suffered. It was proven that a reasonable method of mitigating the overdraft charges was available, and Haiti failed to dispute or contradict this point or prove other damages. Thus, the damages, if any, recoverable by Haiti for overdraft charges, are limited to the premium of the discharge of attachment bond, $4,637.50.

CONCLUSION

For all of the foregoing reasons, upon the record and the applicable law, the decision and order of Judge Weinfeld, and the judgment entered thereon the 27th day of August, 1976 should be reversed and vacated. Thereafter judgment should be entered in favor of Republic of Haiti and against Hartford Accident & Indemnity Company in the sum of $13,553.02 with interest from June 11, 1974.

Respectfully submitted,

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NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

THE UNITED STATES COURT OF APPEALS FOR THE SECOND D CIRC UIT

AEROTRADE

VS

HAITI

VS

A HARTFORD A & I

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

AFRIM HASKAJ being duly sworn,

deposes and says that he is over the age of 21 years and resides at 1481 42nd st, Bklyn Ny

That on the 18th day of November, 1976 at upon he served the annexed appellant's brief

Andreas F. Lowenfeld, attorney for the defendant-appellee, 40 Washington Sq South NY, NY

in this action, by delivering to and leaving with said attorneys

three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 18th day of November, 1976

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Afrim Haskaj